

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the matter of the failure of Benjamin M. Giles) Docket No.: 17-CONS-3100-CPEN
("Operator") to comply with K.A.R. 82-3-111 at)
the Clearwater #2 and Clearwater #5 wells in) CONSERVATION DIVISION
Butler County, Kansas.)
_____) License No.: 5446

ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

I. Background

1. On September 15, 2016, the Commission issued a *Penalty Order* against Benjamin M. Giles (Operator), finding two violations of K.A.R. 82-3-111 at the Clearwater #2 and Clearwater #5 wells, assessing a \$200 penalty, and directing Operator to either plug, return to service or obtain temporary abandonment status for these wells.¹

2. On October 17, 2016, Operator requested a hearing on this matter.

3. On January 24, 2017, Commission Conservation Staff (Staff) filed a Motion requesting the Commission approve a Settlement Agreement between Staff and Operator.²

4. On February 2, 2017, the Commission issued its *Order Approving Settlement Agreement (Order)*, which incorporated the Settlement Agreement into the *Order*.³ Under the terms of the Settlement Agreement, Operator agreed to "plug, return to service, or obtain

¹ *Penalty Order*, p. 3 (Sept. 15, 2016).

² Motion to Approve Settlement Agreement (Jan. 24, 2017).

³ See *Order Approving Settlement Agreement*, ¶ 3 (Feb. 2, 2017).

temporary abandonment status for the subject wells” by May 18, 2017, and if Operator missed that deadline, it was to be assessed a \$5,000 penalty.⁴ Operator further agreed that “[i]f either of the subject wells are not in compliance with K.A.R. 82-3-111 by being plugged, returned to service, or having temporary abandonment status by May 30, 2017, then Operator shall be assessed an additional \$5,000 penalty.”⁵ The Agreement stipulated that wells returned to service by Operator must “successfully pass a Staff-witnessed casing integrity test,”⁶ but made no such stipulation with regard to obtaining temporary abandonment (TA) status.

5. On June 2, 2017, Operator filed a Motion (Motion), which noted the provision of the Settlement Agreement whereby the Operator had until May 18, 2017, to “plug, return to service, or obtain temporary abandonment status for the subject wells,” or be assessed a \$5,000 penalty.⁷ Operator’s Motion also acknowledged that “[o]n May 18, 2017, Operator *filed an application* for temporary abandonment status for the Clearwater #5 well That same day, through counsel Operator notified Staff that the temporary abandonment application had been filed.”⁸ Operator stated that on May 18, 2017, it “also submitted temporary abandonment applications for the Clearwater #6 and #7 wells,” located on the same lease as the Clearwater #5 well.⁹

6. Operator’s Motion explained that on May 24, 2017, Staff denied Operator’s application for TA status on its Clearwater #5 well on the basis of a failed casing integrity test.¹⁰ Operator was notified on that same day that its license was being suspended and a \$5,000 penalty

⁴ See Settlement Agreement, ¶ 2 (attached to the *Order*).

⁵ *Id.*

⁶ *Id.*, ¶ 3.

⁷ Motion, ¶ 5 (June 2, 2017).

⁸ Motion, ¶ 9. (Italics added).

⁹ Motion, ¶ 12.

¹⁰ Motion, ¶ 10.

was being assessed to Operator.¹¹ According to Operator, on May 22, 2017, Staff had approved the TA applications for the Clearwater #6 and #7 wells.¹²

7. Operator's Motion charged Staff with requiring the Clearwater #5 well to "pass a casing integrity test to obtain" TA status, something "not prescribed by the Settlement Agreement adopted by the Commission."¹³ Operator also asserted that Staff's casing integrity requirement was not stated "until after Operator's performance deadline date had passed."¹⁴

8. Ultimately, Operator asked the Commission to issue an order "(i) declaring that Operator has fully performed its obligations under the Settlement Agreement approved by the Commission in this docket, (ii) directing Staff to rescind the penalty it improperly assessed against Operator under the Settlement Agreement, and (iii) reinstating Operator's license that Staff has improperly suspended."¹⁵

9. On June 8, 2017, the Commission issued its *Order on Compliance with Settlement Agreement*, finding that the May 24, 2017, assessment of a \$5,000 penalty against Operator and suspension of Operator's license were of no force and effect for thirty (30) days from the date of service of the *Order*, which would be July 10, 2017.¹⁶ The *Order* also directed the Prehearing Officer to hold a status conference with the parties.¹⁷

10. On June 12, 2017, Staff filed a Response to Operator's Motion and the Commission's *Order*. Like Operator, Staff acknowledged that Operator submitted a TA application for the Clearwater #5 well on May 18, 2017.¹⁸ Staff stated that "[o]n May 24, 2017,

¹¹ Motion, ¶ 11.

¹² Motion, ¶ 12.

¹³ Motion, p. 9.

¹⁴ Motion, p. 9.

¹⁵ Motion, p. 1.

¹⁶ *Order on Compliance with Settlement Agreement*, Ordering Clause A (June 8, 2017).

¹⁷ *Id.*, Ordering Clause B.

¹⁸ Commission Staff's Response to Operator's June 2, 2017 Motion and the Commission's June 8, 2017 Order on Compliance with Settlement Agreement, ¶ 4 (June 12, 2017) (Response).

pursuant to Staff policy, the application was denied for failure to demonstrate casing integrity. The same day, pursuant to the Settlement Agreement, Staff suspended Operator's license and assessed a \$5,000 penalty."¹⁹ Staff noted that the Clearwater #5 obtained TA status on June 8, 2017, but that Operator had not made a payment "for its violation of the May 18, 2017 deadline. Thus, Operator remains out of compliance with the Settlement Agreement."²⁰

11. Staff's Response variously mentioned Staff or Commission policies, practices and procedures it applied to Operator in this case, but provided no citation to or record evidence of such policies, practices, and/or processes.²¹ Staff's Response also mentioned Staff's belief that "the Clearwater wells had casing leaks,"²² but provided no explicit evidence that it held such a belief nor that it communicated that belief to Operator prior to the casing integrity test conducted on the Clearwater #5 well after May 18, 2017.

12. On June 27, 2017, Operator filed a Reply, noting Staff's acknowledgement that "both of the wells subject to the settlement agreement are compliant with Commission regulations."²³ Operator questioned why Staff "neglect[ed] the temporary abandonment application for the Clearwater #5 well while taking action to approve applications for two identically situated wells on the Clearwater lease."²⁴

13. On June 29, 2017, Staff filed a Motion to Strike Operator's June 27, 2017 Reply (Motion to Strike), arguing that (1) Operator's Reply was not authorized by a regulation or by Commission order; (2) the Reply was untimely because it came in at 7:22 p.m. on June 26, 2017; and (3) the Reply is immaterial, adding nothing of factual value, and only "rehash[ing] covered

¹⁹ Response, ¶ 4.

²⁰ Response, ¶ 6.

²¹ See Response, ¶¶ 1, 4, 13, 16 (fn. 6), 17, 19, 20, and 27.

²² Response, ¶ 15.

²³ Reply, p. 2 (June 27, 2017).

²⁴ Reply, pp. 4-5.

ground while publicly hurling invective at Staff.”²⁵ Thus, Staff asked the Commission to strike Operator’s Reply from the record.²⁶

14. On June 30, 2017, the Prehearing Officer held a status conference, as directed by the Commission’s June 8, 2017, *Order*. Operator and Staff, through their respective counsel, attended the status conference. Operator and Staff agreed that all wells in this proceeding are now in compliance and that the only remaining issue is enforcement of the \$5,000 assessment against Operator pursuant to the Settlement Agreement. Operator and Staff also sought clarification regarding any continued effectiveness beyond July 10, 2017, of the Commission’s *Order* staying the force and effect of the \$5,000 penalty assessed against Operator. Staff asked that a hearing be scheduled, and although Operator opposed a hearing and stated its request to have the Commission rule on the pleadings as filed, both Staff and Operator ultimately agreed on deadlines for pre-filed testimony, settlement proposals, and a hearing date.

15. On July 10, 2017, Operator filed a Response to Staff’s Motion to Strike, asking the Commission to deny Staff’s Motion to Strike Operator’s Reply.²⁷

II. Findings and Conclusions

16. The Commission finds there are no material facts in issue at this point in the proceeding, and Staff cannot be harmed by the resolution of this matter. Therefore, the Commission finds a hearing is unnecessary to decide this case, and the Commission has discretion to rule on the pleadings through a summary order.²⁸

17. The Commission finds that both Operator and Staff freely and voluntarily entered into the Settlement Agreement approved by Commission order on February 2, 2017.

²⁵ Motion to Strike, ¶¶ 5-8 (June 29, 2017).

²⁶ Motion to Strike, p. 3.

²⁷ Response to Staff’s Motion to Strike, p. 3 (July 10, 2017).

²⁸ See K.S.A. 77-506; K.S.A. 77-537; K.A.R. 82-1-232(b)(2).

Notwithstanding Operator's contention that "the material terms" of the Settlement Agreement "were not negotiable,"²⁹ there is no record evidence that Operator was compelled against its will to enter into the Agreement. Operator was at all times free to reject the Settlement Agreement prior to signing it.

18. The Commission also finds both parties affirm that the Settlement Agreement required Operator to "plug, return to service, or *obtain* temporary abandonment status for the subject wells" by May 18, 2017,³⁰ and that Operator waited until May 18, 2017, to *apply* for TA status for the Clearwater #5 well.³¹

19. The Commission finds no citation by Operator to any legal or policy authority, nor to any record evidence, requiring Commission Conservation Staff to process an application for TA status the very day the application is submitted. Rather, the Commission finds such an assumption unreasonable, particularly given that Operator had known of the May 18, 2017, deadline since February 2, 2017. Operator's appeal to the quick turnaround on its TA applications for the Clearwater #6 and #7 wells on the same lease, in contrast to the allegedly slow turnaround on the Clearwater #5 well, is also unpersuasive to the Commission,³² because as Operator admits, TA status was not granted on the #6 and #7 wells until May 22, 2017, a date beyond the May 18th deadline in the Settlement Agreement.³³

20. Thus, by not having an *approved* TA status on its Clearwater #5 well on May 18, 2017, the Commission finds that Operator did not fully perform its obligations under the Settlement Agreement, and therefore, is liable to incur a penalty for its failure.

²⁹ Motion, ¶¶ 4-5.

³⁰ See Motion, ¶ 5; Response, ¶ 3. (Italics added).

³¹ See Motion, ¶ 9; Response, ¶ 4.

³² See Motion, ¶ 12.

³³ Motion, ¶ 12.

21. On the other hand, the Commission finds that Operator did not seek to dodge its obligations under the Settlement Agreement entirely. While Operator's compliance actions were not timely, Operator took action nonetheless. Staff does not dispute that Operator applied for TA status on its Clearwater #5 well at the Settlement Agreement deadline,³⁴ twice attempted a casing integrity test on the well on May 30, 2017,³⁵ worked on the well between May 30 and June 8, 2017,³⁶ and ultimately obtained TA status on the well on June 8, 2017.³⁷

22. In addition, the Commission has strong concerns about a lack of specificity and clarity in the Settlement Agreement and Staff's failure to provide Operator with adequate guidance.

23. Regarding the Settlement Agreement, the Commission finds that if Staff had concerns about casing leaks at the Clearwater #5 well,³⁸ Staff should have made those concerns explicit in the Settlement Agreement and specifically conditioned approval of TA status on Operator's successful passing of a casing integrity test. Moreover, Staff should have made Operator aware of its suspicion that casing leaks were present on the Clearwater #5 well *before* Operator submitted its application for TA status on that well. Staff's statement that it "specifically required a casing integrity test as part of the settlement if a well *was to be returned to production*, to avoid allowing a well suspected of casing leaks from continuing to create environmental risks,"³⁹ did not provide adequate guidance to the Operator seeking TA status.

24. Further, Staff's references to practices, policies and procedures, without any cited evidence of such, also demonstrate deficient guidance for an Operator. For example, Staff

³⁴ Response, ¶ 4.

³⁵ Response, ¶ 5.

³⁶ Response, ¶ 6.

³⁷ Response, ¶ 6.

³⁸ See Response, ¶ 15.

³⁹ Response, ¶ 15. (Italics added).

provided no evidence of a “Notice of Violation letter” it claims to have sent to Operator,⁴⁰ no evidence that it had communicated to Operator that the high fluid levels on the Clearwater #5 well were “indicative of casing leaks,”⁴¹ nor any evidence of what fluid levels would actually indicate a casing leak.⁴² The Commission finds Staff must better develop and support the record evidence in future proceedings and include language in future Settlement Agreements setting out specific actions it requires an Operator to take in fulfillment of such an Agreement.

25. Regarding Staff’s Motion to Strike and Operator’s Response to Staff’s Motion to Strike, the Commission finds that granting the Motion would not materially alter the Commission’s analysis in this matter, and therefore, the Motion is denied.

26. The Commission has been given jurisdiction and authority to regulate oil and gas activities in order to prevent waste,⁴³ prevent pollution,⁴⁴ and protect correlative rights.⁴⁵ Obtaining Operator compliance accomplishes these purposes, and thus, the Commission finds such compliance is the ultimate aim of its conservation regulatory activities. Compliance has been achieved in this case.

27. Therefore, while the Commission strongly emphasizes that it does not take Operator’s failure to comply with the terms of a Commission-approved Settlement Agreement lightly, the Commission also finds a \$1,000 penalty is reasonable in light of Operator’s eventual compliance.

THEREFORE, THE COMMISSION ORDERS:

- A. A \$1,000 penalty is assessed against Operator.
- B. Staff’s Motion to Strike Operator’s June 27, 2017 Reply is denied.

⁴⁰ See Response, ¶ 1.

⁴¹ See Response, ¶¶ 16, 18.

⁴² See Response, ¶ 19.

⁴³ See K.S.A. 55-604.

⁴⁴ See K.S.A. 74-623

⁴⁵ See K.S.A. 55-703. See also K.A.R. 82-3-100(b).

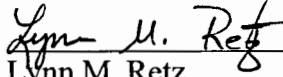
C. The parties have fifteen (15) days from the date of electronic service of this Order in which to petition the Commission for reconsideration.⁴⁶

D. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: JUL 11 2017



Lynn M. Retz
Secretary to the Commission

Mailed Date: July 11, 2017

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⁴⁶ K.S.A. 66-118b; K.S.A. 77-529(a)(1). See K.A.R. 82-1-232(b)(2).

CERTIFICATE OF SERVICE

I certify that on 7/11/17, I caused a complete and accurate copy of this Order to be served electronically and via United States mail, with the postage prepaid and properly addressed to the following:

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